IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No. 120 of 2001
with
CIVIL REVISION APPLICATION NO.138 of 2001

For Approval and Signature:

HONOURABLE MR.JUSTICE P.B.MAJMUDAR

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MADHUBEN WD/O VISHNUBHAI NARANDAS BAROT AND OTHERS
Versus
SARVODAYA COMMERCIAL CO-OPERATIVE BANK LTD. AND OTHERS

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Appearance :
MR VC DESAI for the applicants
MR PRAKASH K JANI for Opponent No.1
Opponents Nos.3 and 4 Served
MR AV TRIVEDI for Opponent No.5

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CORAM : HONOURABLE MR.JUSTICE P.B.MAJMUDAR

Date : 07/03/2006

COMMON ORAL JUDGMENT

Since the point in both the revision applications is common, with

the consent of the parties both the matters are taken up for hearing today and are disposed of by this common judgment and order.

By filing these revision applications under Section 115 of the Civil Procedure Code, the petitioners have challenged the order passed by the learned Civil Judge (Senior Division), Mehsana below application Exhibit 47 in Special Execution Petition No.101 of 1998 as well as in Exhibit 46 in Special Execution Petition No.102 of 1998.

Respondent No.1-Sarvodaya Commercial Cooperative Bank Limited instituted two suits being Arbitration Suit No.1163 of 1994 and 1164 of 1994. So far as Arbitration Suit No.1163 of 1994 is concerned, the same was filed against one Bhavin Sales and another. In the aforesaid suit, one Vishnubhai Barot was joined as one of the defendants as he stood as surety in connection with the loan advanced by the Bank to the principal debtors. So far as Arbitration Suit No.1164 of 1994 is concerned, it was filed against M/s H.R. Sales Agency wherein also said Vishnubhai Barot was impleaded as one of the defendants as he stood as guarantor in connection with the loan granted by the Bank to the principal debtors. Both the aforesaid suits were decreed by the Court i.e. Board of Nominees, Mehsana by his judgment and order dated 11.5.1998. On the basis of the award, a recovery certificate was obtained by the Bank from the District Registrar against the judgment debtors. It is pointed out to the Court that at the time of passing the award, since original debtor, Shri Vishnubhai had expired, the recovery certificate was obtained against the heirs of Vishnubhai. On the basis of the said recovery certificate, the plaintiff-bank filed Execution Petition No.101 of 1998 insofar as it relates to award passed in Arbitration Suit No.1163 of

1994 and Execution Petition No.102 of 1998 insofar as it relates to award passed in Arbitration Suit No.1164 of 1994. A sale proclamation was issued by the Executing Court for attaching and selling the properties of one of the judgment debtors, namely, Vishnubhai. At that stage, the heirs of deceased Vishnubhai, the petitioners herein in each of the matter, submitted their objections. So far as Execution Petition No.101 of 1998 is concerned, the objections were filed at Exhibit 30 whereas the objections were filed at Exhibit 29 in Execution Petition No.102 of 1998. The say of the petitioners in the said objection application is that the award was passed by the Board of Nominees Court against Vishnubhai, who was the surety. However, before passing the award, said Vishnubhai had already expired on 26.12.1994 while the award was declared on 11.5.1998. The say of the applicants is that since the heirs of deceased Vishnubhai were not brought on record, the award cannot be executed against the applicants on the basis of such a decree, which is a nullity in the eye of law. It is pointed out that both the applications Exhibit 30 and Exhibit 29 are pending. The applicants thereafter gave applications Exhibit 47 and 46 in Execution Applications Nos.101 of 1998 and 102 of 1998 respectively with a request that till the objections filed by the present petitioners are decided i.e. Exhibit 30 and 29, the final decision in Execution Petitions may not be taken. However, the learned Judge of the Executing Court rejected both the applications Exhibit 47 filed in Execution Petition No.101 of 1998 and Exhibit 46 filed in Execution Petition No.102 of 1998 by his common judgment and order dated 21.12.2000 meaning thereby the request for staying the execution petitions is rejected and it was ordered that the Execution Petitions be proceeded further. It is the aforesaid order, which is impugned in this revision application at the instance of the original applicants.

Mr Desai who is appearing for the petitioners in both the revision applications submitted that since the original decree was passed against a dead person, the execution petition against his heirs is not maintainable and such decree cannot be executed against the heirs as it is a nullity. In this behalf Mr Desai has relied upon decision of the Honourable Supreme Court in the case of Kishun @ Ram Kishun (Dead) Through Legal Heirs v. Bihari (D) By Legal Heirs, 2005 Supreme Court Appeal Reporter (Civil) 723. Mr Desai has further submitted that the Executing Court has committed an error in not holding that the decree is a nullity on the ground that son of Vishnubhai Barot i.e. Nareshbhai was given power of attorney and he was representing the case on behalf of the principal debtors before Nominees Court.

The Executing Court has come to the conclusion that since son of said Vishnubhai Barot was already holding power of attorney, it was his duty to disclose the said fact before the Executing Court and since he had not disclosed the same, the decree cannot be said to be a nullity.

It is required to be noted that the applications given by the present applicants, which is a substantive applications at Exhibit 30 and 29 in the respective Execution Petition are not yet decided by the Executing Court and the impugned order was passed in applications at Exhibit 47 and 46 filed for staying the further proceedings of Execution Petitions till the applications at Exhibit 30 and 29 are decided. Prima facie, it is possible to accept the say of the petitioners that for whatever reasons if the heirs of judgment debtor are not brought on record and if the decree is passed against dead person, it is a nullity. So far as the rest of the judgment

debtors are concerned, the said decree can always be executable, but even if the power of attorney holder, who is the son of late Vishnubhai Barot had not disclosed the said fact, decree against said Vishnubhai cannot be termed as a valid decree. It is further pointed out by Mr Jani that original applications Exhibit 29 and 30 are pending in the respective Execution Petitions. Considering the said fact, it would be just and proper to direct the Executing Court to decide the said applications at Exhibit 29 and 30 in the respective Execution Petitions expeditiously and till the said applications are decided, execution proceedings may not be proceeded further. The learned Judge of the Executing Court is accordingly directed to decide applications at Exhibit 29 and 30 within a period of three months from the date of receipt of writ of this Court without being influenced by the observations made by the Executing Court earlier while deciding applications at Exhibit 47 and 46 in Execution Petition No.101 of 1998 and 102 of 1998 and the observations made by this Court in this order, which are tentative in nature. It is further directed that till the aforesaid applications at Exhibit 29 and 30 are decided, the Executing Court shall not proceed with the execution application and no coercive steps against the applicant herein be taken by enforcing the recovery certificate against them.

In view of the aforesaid observations and directions, the common order dated 21.12.2000 passed by the learned Civil Judge (Senior Division) below applications Exhibit 47 and 46 in Execution Petition Nos.101 of 1998 and 102 of 1998 respectively is quashed and set aside. Rule is made absolute with no order as to costs.

(P.B.Majmudar)

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